UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re: BRIDGESTONE/FIRESTONE, INC. TIRES PRODUCTS LIABILITY LITIGATION	)	Master File No. IP 00-9374-C-B/S MDL No. 1373 (centralized before Hon. Sarah Evans Barker, Judge)
THIS ORDER APPLIES TO: ALL CASES	)	

ORDER ON PENDING DAUBERT MOTIONS

Introduction

The defendants in this MDL have filed several motions to exclude the testimony of certain experts on the ground that their testimony does not meet the standards set forth by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). First, defendant Bridgestone/Firestone North American Tire LLC ("Firestone") has filed *Daubert* motions that relate to all cases in the MDL in which the plaintiffs have designated Ken Pearl and/or H.R. Baumgardner as liability experts ("all case" motions). With the all case motions, Firestone seeks to bar portions of the "core" opinions on

liability rendered by Mr. Pearl and Mr. Baumgardner. Second, Firestone has directed *Daubert* motions to a number of individual cases in which the subject tire is not available for physical inspection and the plaintiffs have designated Ken Pearl and/or H.R. Baumgardner as liability experts ("missing tire" motions). Finally, defendant Ford Motor Company ("Ford") has filed, in connection with several pending cases, a "Motion to Exclude the Opinion Testimony of Plaintiffs' 'Core' Expert Melvin Richardson." This Order addresses these motions in turn.

"All Case" Motion

On October 1, 2002, Firestone filed Defendant Bridgestone/Firestone North American Tire LLC's Motion to Limit Expert Testimony of Kenneth Pearl and Defendant Bridgestone/Firestone North American Tire LLC's Motion to Limit Expert Testimony of H.R. Baumgardner. The parties then fully briefed the issues presented by the motions and made their evidentiary submissions. The Court set the motions for hearing in March, 2003, but later continued the hearing at counsels' request following the settlement of a large number of cases in the MDL. It appears to the Court, having reviewed the remaining active cases on the MDL docket, that there may be no such cases in which (1) Firestone is still a party and (2) Mr. Pearl and/or Mr. Baumgardner has been designated by the plaintiff(s) as an expert. Firestone is therefore ORDERED TO SHOW CAUSE, on or before February 5, 2004, why its all cases *Daubert* motion is not now moot. The plaintiffs' response to Firestone's submission, if any, shall be filed by February 12, 2004.

"Missing Tire" Motions

The Court has determined, with respect to Firestone's "missing tire" motions, that the parties' written submissions (consisting of both evidence and legal argument) fully explicate the issues and that further hearing is not necessary for the Court to rule. For the reasons set forth below, Defendant Bridgestone/Firestone North American Tire LLC's Motion to Limit Expert Testimony of H.R. Baumgardner in Missing Tire Cases and Defendant Bridgestone/Firestone North American Tire LLC's Motion to Limit Expert Testimony of Kenneth Pearl in Missing Tire Cases are DENIED.

Firestone's "missing tire" *Daubert* motions directed at Pearl and Baumgardner are virtually identical and are therefore addressed together.[1] A "missing tire" case is one in which the tire is not available for physical inspection, typically because a plaintiff or

[1]Firestone's motion directed at Mr. Pearl's expert testimony raises an additional issue. Although Firestone has not grounded its *Daubert* challenge to Mr. Pearl on an asserted lack of qualification as an expert, its papers offer some professional and personal criticisms that Firestone claims are "relevant to an evaluation of the context in which the specific opinions at issue were formed." Firestone argues that Mr. Pearl has, since leaving General Tire in 1989, focused on litigation consulting "adverse to virtually every major tire company." It further claims that he has done no technical work in over ten years and has done none relating to the tires at issue. Firestone also attacks Mr. Pearl's failure to perform certain types of testing on the subject tires. Finally, Firestone has charged that Mr. Pearl misrepresented his college graduation date and the circumstances surrounding his departure from General Tire. The Court finds that these matters are potential subjects for cross-examination or impeachment but do not warrant the exclusion of his testimony.

insurance company discarded it shortly after the accident.[2] In several of these cases, the plaintiffs have designated Mr. Pearl and/or Mr. Baumgardner as expert witnesses on liability with respect to the Firestone tires at issue.

Firestone's *Daubert* challenges are grounded in two primary arguments: first, Firestone maintains that both of these experts are on record in other cases saying that the unavailability of the tire at issue prevented them from reaching an opinion about the cause of the tire failure; second, Firestone claims that their missing tire methodology does not satisfy the *Daubert* standard. On the former point, Firestone has detailed Mr. Baumgardner's and Mr. Pearl's testimony in other cases, and, in Mr. Baumgardner's case, language from his tire failure analysis handbook, to the effect that a physical inspection of a tire is critical to a determination of the cause of tire failure. On the latter point, Firestone asserts that the validity of their methodology (for example, comparing results of causation determinations made with photos and other evidence to results of determinations made with the physical tire) has not been tested, that a "missing tire" methodology has not been endorsed in the literature or by other experts and has not been

[2]The plaintiffs point out that the tires were discarded often because Firestone's conduct in concealing the "systemic defect" in the tires kept the plaintiffs from knowing of a possible defect and of a reason to keep the tires. They argue that Firestone should be estopped from attempting to exclude the other (admittedly inferior) evidence as a result of its conduct. We need not reach that issue here.

subjected to peer review, and that Mr. Baumgardner and Mr. Pearl are unaware of the rate of error for their methodologies.[3]

The plaintiffs counter that Firestone's motions ignore the facts and applicable law of the individual cases and that the issue cannot be determined on a global basis. The quantity and quality of proof in the individual cases can vary widely, say the plaintiffs, and the Court should not rule as a broad proposition that a plaintiff can never sustain its evidentiary burden without the tire. They point in support of this argument to this court's summary judgment rulings in some of the missing tire cases, which explain that whether the plaintiff can sustain her burden depends on the applicable state law and the evidence the plaintiff has mustered.

The plaintiffs address Firestone's specific challenges as follows: they emphasize the alleged "systemic defect" in the tires as evidence that defect was a probable cause of the accidents in question; they point out that these experts have never testified that a forensic opinion on failure can *never* be given in the absence of the tire; they explain that there are numerous facts the experts can examine even if they do not have the tire,

---

[3]Firestone also maintains that when it took these two experts' depositions, they testified as to all the materials or other information on which they had relied in forming their opinions. However, after Firestone filed its *Daubert* motions, both did new affidavits in which, according to Firestone, they assert reliance on things not identified in their depositions or produced in advance of the depositions as the Court had required. Firestone has filed a motion to strike these materials and has also argued in reply on each motion that the Court should not consider these matters in determining whether the proffered testimony satisfies the *Daubert* standard. In light of our disposition of these motions, we DENY AS MOOT Firestone's motion to strike.

including photographs, police reports, witness, driver, and occupant statements, eyewitness descriptions of the tire, road conditions, temperature, and the like; finally, they maintain that Firestone's experts as well as other tire experts acknowledge that causation can be determined without the tire itself.

Having considered these arguments, as well as the evidentiary submissions of the parties, the Court finds that *Daubert* does not compel the wholesale exclusion of expert testimony by Mr. Pearl or Mr. Baumgardner in all missing tire cases. First, the Court does not find their prior statements regarding the need to examine a tire physically to be so unequivocal as to make them something more than the subject of cross-examination.

Second, as this court has noted in numerous rulings on Firestone's motions for summary judgment in "missing tire" cases, the nature and quantum of proof necessary to establish a products liability claim is established by state law; we have entered summary judgment in missing tire cases where the available evidence was not sufficient, under the applicable law, to sustain the plaintiff's burden of establishing defect and/or causation. This court has not held, however, that a products liability claim can *never* be sustained without physical inspection of the product itself. A case-specific inquiry, the Court finds, is the appropriate vehicle for addressing the sufficiency of a plaintiff's expert proof.

Finally, we are not persuaded by Firestone's argument that its *Daubert* motions are not premised on a contention that the cause of tire failure can *never* be determined without the tire, but rather on the point that the methodologies of Mr. Baumgardner and Mr. Pearl do not provide a reliable basis for determining defect so as to comport with *Daubert.* The problem with this argument is that the reliability of the expert's methodology in a given case is also a case-specific inquiry, because the amount of evidence the expert had and the methodology employed can differ. Although Firestone has presented some examples with respect to the methodology employed by Mr. Pearl and Mr. Baumgardner in *a few* missing tire cases, its arguments are primarily general ones. In fact, the specific evidence regarding methodology it has presented appears to relate to cases no longer pending against it. We cannot apply the *Daubert* factors in a vacuum; again, whether the expert testimony comports to the *Daubert* standard must be determined according to the facts and law of each case.

For all of these reasons, Firestone's motions to exclude the testimony of Mr. Pearl and Mr. Baumgardner in the "missing tire" cases are DENIED.

Motion to Exclude Melvin Richardson

In June and July, 2003, Ford filed motions in six pending cases to exclude the "core" expert opinion of Dr. Melvin Richardson in cases involving 1995-2001 Ford Explorer 4-door 4X4 vehicles. The plaintiffs have filed motions to strike Ford's motions

to exclude in which these plaintiffs maintain that Dr. Richardson has been designated a case-specific expert, not a "core" expert. Hence, argue these plaintiffs, Ford's motions are not properly directed to this court but are to be decided by the transferor court on remand, as provided by an earlier order of this court.[4]

Two of the cases subject to Ford's motions have since been resolved and closed. The Court has examined the parties' filings in each of the four remaining active cases,[5] and finds that Dr. Richardson's expert opinions are case-specific and properly decided upon remand.

First, it is undisputed that Dr. Richardson withdrew as a core expert in the MDL on February 14, 2003, well before the filing of Ford's motion. Second, although Dr. Richardson's expert reports in these cases contain some opinions identical to those expressed in his withdrawn core report, the reports are still based on reconstruction of the specific accident at issue and/or other analysis of the specific accident data. This court has observed with respect to most of the case-specific reports it has had occasion to review that the experts have included opinions regarding claimed systemic defects which, by definition, will be common with other opinions they offer on the same type of product.

---

[4]In its order of January 3, 2003, in connection with previously-scheduled *Daubert* hearings, this court ordered that it would defer ruling on all remaining case-specific motions to exclude expert testimony for determination by the transferor court following remand.

[5]These cases are *Brzobohaty*, 00-5065, *Castrillo*, 00-5078, *Viloria*, 00-5079, and *de Zerpa*, 01-5434.

That does not make them "core" opinions by this court's definition, and we are unpersuaded by Ford's arguments that its motions to exclude should be decided before remand.

Although we find that Ford's motions are directed to case-specific, rather than "core," expert testimony, we will not strike the motions. Rather, we will, in accordance with the January 3, 2003 order, simply defer the ruling to the transferor court.[6]

For the foregoing reasons, the plaintiffs' motions to strike in the above cases are DENIED. The substance of the relief the plaintiffs seek, however, is GRANTED. This court will defer ruling on Ford's motions to exclude the expert testimony of Dr. Melvin Richardson for ruling by the transferor court upon remand.

It is so ORDERED this _____ day of January, 2004.

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

[6]The proper manner for raising a case-specific motion in the MDL is to file a notice of intent to file the motion upon remand, but striking the motions and requiring Ford to file them again after remand would be wasteful. The plaintiffs shall file their responses to Ford's motions after remand and according to a schedule established by the transferor court.

Copy to:

Irwin B. Levin
Cohen & Malad
136 North Delaware Street
P O Box 627
Indianapolis, IN 46204

William E. Winingham
Wilson Kehoe & Winingham
2859 North Meridian Street
PO Box 1317
Indianapolis, IN 46206-1317

Randall Riggs
Locke Reynolds LLP
201 N Illinois St Suite 1000
PO Box 44961
Indianapolis, IN 46244-0961

Daniel P. Byron
Bingham McHale
320 N Meridian St
1100 Chamber of Commerce Bldg
Indianapolis, IN 46204